VOLUME 13 PART 3—Pages 33-48

THE AUSTRALIAN LAWYER

being the
Thirteenth Volume of The
Australian Conveyancer and Solicitors Journal

MARCH 1960

BUTTERWORTH & CO. (AUSTRALIA) LTD.
(Incorporated in England)
SYDNEY: 6-8 O'Connell Street
MELBOURNE: 430 Bourke Street :: 240 Queen Street, BRISBANE

Registered in Australia for transmission by post as a periodical.

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MENTAL INCAPACITY TO MAKE A WILL —AUSTRALIA

Evidentiary Matters

by

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In a former article[1] an attempt was made to outline the Australian experience with regard to general aspects of mental incapacity to make a will. The present purpose is to consider the other aspect, the evidentiary.

The burden of proof

In the first instance, the onus lies upon the person propounding the will to establish the competency of the alleged testator. This approach has been consistently adopted by Australian Courts,[2] for the establishment of competency is but one step along the path which must be followed by all persons seeking probate, and which was mapped out by ISAACS, J. in *Bailey* v. *Bailey*[3] thus:

> "The onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if this is not discharged the court is bound to pronounce against the instrument . . . This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence."

The primary onus is not, however, a heavy one, and "is, in the first place, discharged by establishing a prima facie case."[4] "A prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the court judicially that the will propounded is the last will of a free and capable testator."[5] In appropriate cases, a prima facie case may be established by mere proof that the will has been properly executed[6] or, at most, by convincing the court that the dispositions contained in the will do not, in themselves, suggest that

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[1] "Mental Incapacity to Make a Will—Australia" in Australian Conveyancer and Solicitors' Journal, October, 1959, p. 145.

[2] *Worth* v. *Clasholm* (1952), 86 C.L.R. 439; *Bailey* v. *Bailey* (1924), 34 C.L.R. 558; *Bull* v. *Fulton* (1942), 66 C.L.R. 295, for examples in the High Court.

[3] (1924), 34 C.L.R. 558, at p. 570.

[4] (1924), 34 C.L.R. 558, at p. 570

[5] (1924), 34 C.L.R. 558, at p. 570.

[6] *Bull* v. *Fulton* (1942), 66 C.L.R. 295, at p. 343; *Browne* v. *McElphone* (1885), 15 L.R. (N.S.W.) B. & O. 154.

the alleged testator was incompetent.[7] It is probably quite justifiable to put forward these two expedients as being of general application. It is quite true that, in *Bailey* v. *Bailey*, ISAACS, J.[8] explains that:

> "The *quantum* of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the court varies with the circumstances."

It is believed, however, that so far as the establishment of a prima facie case is concerned, this statement can have no application, for it is difficult to see how, at the very beginning of a case, circumstances which, *ex hypothesi*, will not be revealed until further evidence is adduced, can affect the *quantum* of evidence necessary to discharge the primary onus. The dictum of ISAACS, J. is to be taken as being indicative rather of the secondary and main onus lying on the proponent which, admittedly, will be greater or lesser according to the evidence adduced. It may be, of course, that the proponent will himself adduce evidence increasing the secondary onus which lies upon him, as, for example, by revealing the great age of the alleged testator.

"Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, . . . then the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof."[9] The ease with which a prima facie case can be established, as mentioned above, means that, substantially, the main onus lies upon the opponents of the will to establish the incapacity of the testator. This is so by virtue of the fact that the court is not prepared to make the same easy inferences in the case of the opponent as in that of the proponent. In the case of the latter, capacity may be initially presumed from the existence of a shaky cross placed on the document under the guidance and supervision of the adviser. However, "to displace a prima facie case of capacity and due execution mere proof of serious illness is not sufficient; there must be clear evidence . . . that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property".[10] Assuming that clear evidence of such a nature is adduced, the onus is again displaced and the proponent is left with the task of proving capacity strictly.[11]

[7] *Perpetual Executors, Trustees and Agency Co. (W.A.) Ltd.* v. *Deacon* (1936), 38 W.A.L.R. 31.
[8] (1924), 34 C.L.R. 558, at p. 571.
[9] (1924), 34 C.L.R. 558, at p. 571.
[10] (1924), 34 C.L.R. 558, at pp. 571-2.
[11] *Bull* v. *Fulton* (1942), 66 C.L.R. 295, at p. 343.

Such is the strict procedure as it appears in the reported cases. In most instances, however, it will not be necessary. As was said in *Bull* v. *Fulton*:[12]

> "Usually the evidence is such that the question upon whom the onus of proof lies is immaterial."

In his judgment in *Landers* v. *Landers*,[13] RICH, J. goes considerably further and is almost scornful of the sophistry suggested by the oscillations outlined above. This is not without some justification. As RICH, J. says:

> "In the end the tribunal—the court or jury—must be able, affirmatively, on a review of the whole evidence, to declare itself satisfied of the testator's competence at the time of the execution of the will."

If there be any onus at all, it lies throughout on the proponent,[14] that is to say, that in the event of an absence of conviction one way or the other, the court must find against the proponent. Thus, in *Bull* v. *Fulton*:[15]

> "Where the evidence as a whole is sufficient to throw a doubt upon the testator's competency, then the court must decide against the validity of the will unless it is satisfied affirmatively that he was of sound mind, memory and understanding when he executed it."

The standard of proof

As is suggested in the dicta above quoted from *Landers* v. *Landers* and *Bull* v. *Fulton*, the onus upon the proponent would seem to be the normal civil standard of proof on a balance of probabilities. Suggestion otherwise, however, necessitated an express statement of this point in *Worth* v. *Clasholm*[16] where it was decided that the burden which lies upon the proponent is not of proof "to the point of complete demonstration" nor of a proof "beyond a reasonable doubt". A residual doubt is not enough to defeat a claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution. One difficulty remains after *Worth* v. *Clasholm* — the meaning of "residual doubt". If this expression means that preponderance of doubt which remains after some sort of cancelling out between doubts for and against the capacity of the alleged testator, then it flies in the face of

[12] (1942), 66 C.L.R. 295, at p. 343.

[13] (1914), 19 C.L.R. 222.

[14] *Bailey* v. *Bailey* (1924), 34 C.L.R. 558, per Isaacs, J., at p. 570.

[15] (1942), 66 C.L.R. 295.

[16] (1952), 86 C.L.R. 439.

the established rules with regard to onus of proof, outlined above, for it says, in effect, that a residual balance of probabilities against the proponent will not defeat him. "Residual doubt" must, therefore, be taken to mean that small measure of doubt which remains unexplained after the proponent has had his final say. *Worth* v. *Clasholm* may thus be explained as deciding that where the proponent succeeds in adducing a substantial amount of unrebutted evidence in favour of capacity, and in rebutting all except a residuum of the doubts cast by the opponents, probate will be granted.

Factors indicative of unsoundness of mind

Evidence tending to establish unsoundness of mind will usually be one of three main types. These types are: (1) The age, state of health and conduct of the alleged testator; (2) the coherency and reasonableness of the document, its consistency with former dispositions and statements of intention and the circumstances of its execution; and (3) opinions of witnesses.

In *Bailey* v. *Bailey*,[17] ISAACS, J. tells us on the one hand:

> "A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments",

and on the other, that among the material circumstances which will determine the *quantum* of evidence required to establish competency, is to be found "extreme age". There is no inconsistency. The proposition, the older the testator, the more difficult it is to establish competency, although not impossible, covers all the ground. This is so mainly because a very frequent source of incapacity is senile decay, so much so that in fact, it raises a presumption of incapacity which can be very difficult to rebut.[18] The whole matter is very well summed up in *Bull* v. *Fulton*:[19]

> "Advancing age generally takes toll of some physical or mental attribute, however tough a person's constitution may be, and it has been recognized so often that it affects the faculty of memory that a will made by a person of advanced age is always carefully scrutinised by the court."

Sickness is, by itself, some evidence of incapacity[20] although even death from an ailment which carries as its usual concomitant insanity is by no means conclusive.[21]

[17] (1924) 34 C.L.R. 558, at p. 570.
[18] *Ponder* v. *Burmeister*, [1909] S.A.L.R. 62.
[19] (1942) 66 C.L.R. 295.
[20] *Bailey* v. *Bailey* (1924), 34 C.L.R. 558; *McMeckan* v. *Aitken*, [1895] A.C. 310.
[21] *Re Buschel*, [1930] Q.W.N. 45.

The nature of the disease may, however, be valuable. LORD MORRIS, in giving the advice of the Board in *McMeckan* v. *Aitken*, showed awareness of the twin dangers of presuming incapacity from brain disease, and equating the effect of all diseases:

> "Whether it was a cerebral affection or heart affection from which the testator suffered becomes of importance only to the extent that if it was the former the testator would be more unlikely to be capable of understanding business than if the attack arose from the latter cause."[22]

This same case also gives some indication of the value of the conduct of the deceased. It would be purposeless to attempt to catalogue instances of conduct evidentiary of unsoundness of mind for a man can behave abnormally in an infinite number of ways. It is important, however, to remember that conduct can be viewed in two ways. It may be regarded as abnormal as compared with the conduct of others, or as abnormal as compared with the former conduct of the man himself. The latter appears to be a more crucial test. In *McMeckan* v. *Aitken* the alleged testator's way of life changed completely. His correspondence lapsed, his financial affairs which had always been meticulously arranged became more lax.[23] He did, however, retain his business acumen and it was this which decided the day. It would be easy to assume that the Board endorsed the proposition that a man's business conduct is the all-important factor. They do tend to do so. In *Re Burns*,[24] however, the sanity of the business conduct of the alleged testator was held not to override other occasions on which he had behaved in a frivolous and idiotic manner. The answer perhaps lies in emphasis, and in the existence of other circumstances. In *Re Burns*, for example, the actual dispositions contested were unreasonable by comparison with those in *McMeckan* v. *Aitken*.

Another symptom which is frequently claimed to be indicative of unsound mind is untruthfulness on the part of the testator. That falsehood and unsoundness of mind may well be associated was recognized in *Prinsep* v. *Dyce Sombre*[25] (approved by the High Court in *Bull* v. *Fulton*):

> "It is . . . true that falsehood, as stated by some of the physicians, is a very common accompaniment of insanity, and that declarations of belief in what has no foundation are one of the most frequent proofs of such insanity."

The telling of a lie is not, however, a completely unequivocal act. Advancing age usually carries with it the impairment of one or more faculties to some degree, and

[22] [1895] A.C. 310, at p. 315.
[23] The more significant, perhaps, in view of his nationality!
[24] (1880), 2 A.L.T. 15.
[25] (1856), 10 Moo. P.C. 232, 297.

forgetfulness does not necessarily amount to incompetency. Yet some people resent what they recognize in themselves as physical failings due to increasing age. The falsehood in *Bull* v. *Fulton* was, in effect, a "face-saving" lie attributable to just this attitude.

Perhaps the most important instance of the conduct of the testator occurs where he states his reasons for making the questioned dispositions. These may clearly be considered.[26]

It was made clear in *Brown* v. *M'Encroe*[27] that the court is not concerned with the justice or injustice of the will except in so far as they are *indicia* of the mind of the testator. A will cannot be struck down because of injustice, but injustice is some evidence of incapacity. The reasonableness of the dispositions has been frequently[28] recognized as having a bearing on the question of competency, as, for example, by ISAACS, J. in *Bailey* v. *Bailey*:[29]

> "As instances of such material circumstances may be mentioned (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries, (b) the exclusion of persons naturally having a claim upon the testator."

Thus, in the recent case of *Boreham* v. *Prince Henry Hospital*,[30] where an estate worth £25,000 was left to a paid housekeeper who had been in the employ of the testator for only seven weeks, the unusualness of the disposition was an important factor. So also were further facts. The alleged will conflicted with an arrangement which the deceased had entered into with his predeceased wife, but this and other facts were withheld from the solicitor who advised the deceased on the particular occasion in question. Conflict with prior arrangements and surreptitious execution both raise doubts as to competency. A further circumstance of the execution of the will should be considered. In *Callaghan* v. *Myers*,[31] we are told:

> "Wills made shortly before death ought to be most closely watched and should only be upheld when they are found to be natural and reasonable under the testator's circumstances, or in conformity with earlier intentions, or when they are otherwise explained or when it is clear to the court that he is sane."

[26] *Ponder* v. *Burmeister*, [1909] S.A.L.R. 62.
[27] (1890) 11 L.R. (N.S.W.) (Eq.) 134.
[28] *Boreham* v. *Prince Henry Hospital* (1955), 29 A.L.J. 179; *In the Will of Key* (1892), 18 V.L.R. 640; *Bailey* v. *Bailey* (1924), 34 C.L.R. 558.
[29] (1924) 34 C.L.R. 558, at p. 571.
[30] (1955), 29 A.L.J. 179.
[31] (1880), 1 L.R. (N.S.W.) 351.

We have already adverted to the use of the due execution of the instrument as being prima facie evidence of sanity.[32]

In the case of opinions of witnesses, little weight may be attached to them in most cases. In *Bailey* v. *Bailey*, ISAACS, J.[33] makes it quite clear that the court values other matters more highly:

> "The opinion of witnesses as to the testamentary capacity of the alleged testator is usually for various reasons of little weight on the direct issue. . . . While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the court must judge from the facts they state and not from their opinions."

There are, however, two particular types of opinion-evidence which appear to be accorded rather more weight than others. These are opinions by businessmen as to business capacity, and, of course, medical evidence. It seems that of these two types, the latter is less suspect. We have already seen how in *In the Estate of Walker*[34] the evidence of three medical men prevailed over the fact that the testator had been found insane by inquisition. The evidence of business associates may be considered to deserve special treatment for two reasons. Generally speaking, a business associate will not be a potential interested party in the last testament of his colleague. Further, ability to handle one's business affairs in a sound manner is closely analogous to if not identical with testamentary acumen. In dealing with the opinion-evidence in *McMeckan* v. *Aitken*[35] LORD MORRIS appreciated the distinction:

> "The witnesses who spoke to occasions of incapacity were not transacting business with the testator, whereas those who did transact business with him were satisfied of his capacity. The two classes of evidence run on different planes."

In conclusion, it should be remembered that there is no unit of measurement common to all types of evidence of incapacity. The process of determining competency is anything but arithmetical. Different emphasis may be laid on the same fact in different circumstances. Experience of probate actions would seem to be the most useful qualification and indeed, at least one appellate court has preferred the opinion of the judge at first instance to that of his lay-colleagues on the jury.[36]

[32] p. 33 *supra*.
[33] (1924), 34 C.L.R. 558, at p. 572.
[34] (1912), 28 T.L.R. 466.
[35] [1895] A.C. 310.
[36] *Wilkie* v. *Wilkie* (1915), 17 W.A.L.R. 156.

INTERNATIONAL LAW ASSOCIATION, AUSTRALIAN BRANCH

by

T. K. HODGKINSON
Honorary Secretary

The aims of the International Law Association, Australian Branch, formed on 20 August 1959, may be stated as including the study and advancement of both public and private international law with a view to finding a solution to conflicts of law, the unification of law and the advancement of international understanding and good will.

Membership is not limited to lawyers but is open to any person and any institution and company. For an Australian membership up to 100 the Branch may elect one of its members to the London Headquarters Executive Council and for a membership between 101 and 250 two such members. As at 29 October 1959 there is a Branch membership of 70 full members and two student members. The Patron of the Branch is Sir Owen Dixon, G.C.M.G.; its President is Professor Julius Stone; three Vice-Presidents, namely Gordon Wallace, Q.C., Professor Zelman Cowen and Dr. D. P. O'Connell, have been elected; and Dr. Frank Louat, Q.C., Edward St. John, Q.C., J. R. Kerr, Q.C., J. G. Starke, W. P. Deane, R. D. Lumb, Miss Betty Archdale and T. K. Hodgkinson are additional members of the Executive Council of the Branch with the latter as Honorary Secretary-Treasurer. The Constitution of the Branch provides that Sub-Branches may be formed, and with a view to stimulating interest in other States appropriate persons resident there have been, or shortly will be, invited to office.

There are twenty-two I.L.A. Committees on which representatives of most countries of the world work on extremely diversified subjects. At the present time problems including United Nations Charter, nationalisation and foreign property, international waterways, enforcement of foreign judgments, trade marks law, family relations and the custody of children, monetary law, air and space law, and the peaceful uses of nuclear energy, are receiving attention from their appropriate Committees and will be discussed in considerable detail during the next International Conference to be held in Hamburg between 8 and 15 August 1960. Australia is represented on four of these Committees, "United Nations Charter" (Professor Julius Stone and Professor N. C. H. Dunbar), "Enforcement of Foreign Judgments" (Professor Zelman Cowen) and

"Trade Marks Law" (T. K. Hodgkinson), and it is expected that other Australians will be elected to other Committees in the not far distant future.

The International Law Association is concerned with international law both public and private and particularly with respect to its bearing on peaceful relations between countries. The International Commission of Jurists is primarily concerned with the rule of law within countries, and the International Bar Association with problems of interest to the legal profession throughout the world.

The Executive Committee is pursuing an active policy. For instance, the first public meeting was held on 26 October 1959 and a most stimulating and informative address was given by the President on "United Nations Forces". On 16 November another public meeting was held at which Dr. E. von Hofmannsthal spoke on "Security of Investment and Expropriation". Other addresses are contemplated for 1960. Such a policy requires the support of all who have an interest in international good will. Enquiries and applications for membership will be warmly welcomed by the Secretary, Suite 709, Caltex House, Kent Street, Sydney.

BOOK NOTICES

CAUSATION

Causation in the Law by H. L. A. Hart and Q. M. Honore. (Oxford University Press.)

CHILDREN

Clarke Hall and Morrison's Law Relating to Children and Young Persons. Second (Cumulative) Supplement to 5th edition. By A. C. L. Morrison and L. G. Banwell. (Butterworth and Company (Publishers), Limited.)

CIVIL PROCEDURE

Questions and Answers on Civil Procedure by M. Fauvelle. (Sweet & Maxwell.)

COMMERCIAL ARBITRATION

The History and Development of Commercial Arbitrators Lectures by Lord Parker. (Oxford University Press.)

EMPLOYER'S LIABILITY

Employer's Liability at Common Law (4th edn.), by John Munkman, LL.B. Published by Butterworth & Co. (Publishers), Ltd.

CONTRACTS

Hudson Building Contracts by E. J. Rimmer & I. N. Duncan Wallace. (Sweet & Maxwell.)

CONVEYANCING

Prideaux—25th Edition. Precedents in Conveyancing, Vol. 2. (Stevens & Sons, Ltd.)

NOTES ON THE UNITED STATES LEGAL SYSTEM

by

DEAN ERWIN GRISWOLD, OF THE HARVARD LAW SCHOOL

(*By Courtesy of the New Zealand Law Journal*)

The Merger of Barristers and Solicitors in the United States

Another question which interests us is that of the separation of the two branches of the profession. In New Zealand there is a nominal separation, and I gather the position is not like that in the United States.

In the United States the separation of the branches of the profession has no significance at all. Most American lawyers would not know what you meant when you talked about it. They are not ordinarily familiar with the distinction between solicitors and barristers in the English practice. Most of them would have difficulty in understanding if you sought to explain it to them. We have never had it, at least for 150 years, and with us a lawyer who is qualified as a lawyer has the right, not merely legally but also professionally, to carry on any kind of practice he has the opportunity to do or wants to do. Now this does not mean, of course, that there are not lawyers who confine themselves to office work. There are lawyers who do nothing but conveyancing or estate work. On the other hand, there are lawyers who confine themselves to court work. This would be particularly true in the automobile running-down area, where both on the plaintiffs' and the defendants' side there are lawyers who do no legal work except in connexion with the trial of cases in court. Even there the lawyer who is going to try the case will also be the lawyer who will carry out negotiations for settlement and, in the greater proportion of cases, settle the case rather than try it. He will be in charge of the preparation of the case for trial.

I would say, therefore, that with us most lawyers do both kinds of work to some extent, without any awareness that they are doing anything other than what lawyers do. In a typical situation a lawyer will handle a matter from beginning to end. It may start off with office planning and follow with the drafting of instruments such as a will or a trust. If, sooner or later, some litigation arises, the same lawyer will conduct negotiations; and, if the matter gets into court, he will try the case in court. He is doing lawyer's work all the time.

Is it very common for a lawyer who does suddenly come up against litigation like this to discuss it with a specialist in that type of litigation?

Occasionally, but rather rarely. The thing that happens more often is for a lawyer who for some reason or other does not have much confidence in trying the case to call in a trial lawyer. This is, of course, not dissimilar to briefing a barrister, except that one never thinks of it that way. Most of the law business in America is done through firms of lawyers, most of them not as big as the New York ones. The typical law firm will have from four to six or eight to ten lawyers altogether. One will be a tax lawyer, one an estate lawyer, and one a trial lawyer. Even then they do not spend their time exclusively in that field. That will be a field where they feel most at home—where they try and keep up with the latest developments—and one of the reasons for entering into partnerships is that one can have someone to turn to for advice.

Would it be right to say, then, that there is specialization, but that it is specialization in fields of law rather than a particular type of work?

Very much so. There is a considerable amount of specialization, though the only specialties which are recognized as such are Admiralty and Patents. As a practical matter much of the tax work—which is extensive—is done by people who specialize in tax work; but they have strongly resisted any effort to recognize a specialty in taxation because they say: "We are lawyers first. It is true we specialize in tax matters but to handle a tax matter adequately we must understand Property, Company Law, Trusts, Wills, etc. We do not want to be labelled as tax men."

Taxation law is, incidentally, a field which does not seem to have developed in either New Zealand or Australia, and, speaking as one lawyer to another, this seems to me a likely field of usefulness to the community that is untapped at the moment.

THE HIRE PURCHASE ACT OF 1959 — QUEENSLAND

by

JOHN P. KELLY, B.A.
Solicitor of the Supreme Court of Queensland

The Hire Purchase Act of 1959 was assented to on 10 November 1959 and by Proclamation published in the Government Gazette of 14 November 1959 came into operation on 1 January 1960. Ancillary legislation involving amendments to related Acts, namely *The Cash Orders Regulation Act Amendment Act of* 1959 and *The Money Lenders Acts Amendment Act of* 1959, were both assented to on the same date.

The legislation is the contribution of Queensland to the steps towards uniform parliamentary regulation of and safeguards for hire-purchase transactions. Various interstate conferences of Justice Department Ministers and of departmental officers and representatives of the Commonwealth Government were held in the first half of 1959, when agreement was arrived at as to the terms of what has been described as a model uniform hire-purchase Bill. There was no agreement which was binding on the States. The "uniform hire-purchase Bill" was recommended for adoption as the general basis for the legislation of the various States but with complete freedom for each State to depart from the terms of the uniform Bill to such extent as might be necessary or desirable to conform with the requirements, the local conditions or the Government policy of the particular State.

The Minister for Justice (Hon. A. W. Munro) has stated that the two basic principles of the new legislation are firstly, that the prospective hirer must be given the fullest possible opportunity to understand the nature and the extent of his prospective obligations and, secondly, that the hirer who does enter into a Hire-Purchase Agreement must be protected to the maximum practicable extent by the express and implied terms of the agreement. These fundamental principles are expressed in the Victorian legislation and in the Queensland Act.

The Act is comprised of six main parts as follows: Formation and Contents of Hire Purchase Agreements, Protection of Hirers, Guarantees, Insurance, Minimum Deposits, Miscellaneous provisions dealing with penalties and attempts to evade the legislation.

The legislation adopted in Victoria in pursuance of these conferences has been admirably summarized in these pages by Mr. McIntyre (Vol. 12, pp. 129 and 169) and no

purpose would be served by setting out the details of the Queensland legislation which conforms to the Victorian Act. Only the main points of departure will be emphasized there.

Equity in the hirer

A provision contained in the repealed Queensland legislation and not in the uniform legislation has been retained in the new Act providing an equitable right in the hirer: "Subject to this Act, the provisions of this Act shall notwithstanding any law to the contrary, be read as granting to the hirer a right in equity in or in respect of the goods composed in the hire-purchase agreement based upon the amounts (including the deposit) paid or provided, whether by cash or other consideration, by or on behalf of the hirer under the Agreement (s. (1) (5)).

Maximum terms charges

Section 29 of the Act provides for a maximum rate of terms charges. The maximum rate *per centum* per annum prescribed for the time being under and for the purposes of *The Money Lenders Acts* 1916 *to* 1959 applies to the terms charges or what is popularly referred to as the interest component in hire purchase agreements. This maximum rate at present is 20 *per centum* per annum. This provision is in addition to the uniform legislation requirement that interest on overdue instalments may not be charged at a rate exceeding eight *per centum* per annum simple interest.

Minimum deposit

Another Queensland departure appears in s. 25, which requires a minimum deposit of one-tenth of the cash price of the goods comprised in the hire purchase agreement. The deposit must be paid in cash or in goods or partly in cash or in goods. This section and ss. 26 and 27 contain detailed and elaborate provisions to ensure that the minimum deposit requirement will not be evaded.

Equality of instalments

Section 3 (3) requires that the difference between the total amount payable under a hire purchase agreement and the deposit shall be paid by equal instalments at equal intervals of time (as in the repealed legislation) or the terms charges to be calculated on a simple interest basis on the amount outstanding from month to month and requires that provision be made for proper adjustments or recovery of terms charges in favour of the hirer where such are not payable by reason of failure by the owner to comply with the provisions of the section. In regard to the equal payments, an instalment which differs from any other instalment by a sum in excess of one pound shall be

taken to be not an approximately equal instalment. The object of this requirement is to provide that the payments shall be of convenient denomination and to enable the ready application of the formula prescribed in relation to refunds.

Slight variations appear in the Forms provided in the Schedule from the Forms in the Uniform legislation and supplementary provisions based on the old Queensland legislation deal with the appointment of inspectors and their duties.

The legislation is obviously of major social significance and its legal effects will be watched with interest.

RULES OF THE SUPREME COURT OF QUEENSLAND — AMENDMENTS

by courtesy of

J. SHANNON, *Registrar*

Order VI, Rule 11, amended by omitting all the words following "that is to say" and substituting:—"payment of moneys secured by the mortgage or charge; sale; foreclosure; delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property; redemption; reconveyance; delivery of possession by the mortgagee."

Order LXIV—new rules added:—

"1A. Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.

1B. Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed.

1C. The Court or a Judge may direct such persons to be served with the summons as they or he may think fit.

1D. The application shall be supported by such evidence as the Court or a Judge may require.

1E. The Court or Judge shall not be bound to determine any question of construction under Rules 1A and 1B hereof, if in their or his opinion it ought not to be determined on originating summons."

LEGISLATIVE CHANGES

Public Service and Other Statutory Bodies (Extended Leave) Act 1959 No. 5 — N.S.W.

Amends the provisions relating to long service leave contained inter alia in the *Public Service (Amending) Act* 1919, the *Irrigation Act* 1912, the *Transport Act* 1930 and the *Police Regulation Act* 1899. Assent: 24 September 1959, *Gazette* No. 112, p. 3009.

University and University Colleges (Amendment) Act 1959 No. 6— N.S.W.

Amending the *University and University Colleges Act* 1900-1952— to provide for the reconstitution of the Board of Secondary School Studies. Assent: 24 September 1959, *Gazette* No. 112, p. 3009.

Wild Flowers and Native Plants Protection (Amendment) Act 1959 No. 7 — N.S.W.

Amends the *Wild Flowers and Native Plants Protection Act* 1927 (as amended) to make further provision for the protection of wild flowers and native plants. Assent: 24 September 1959, *Gazette* No. 112, p. 3009.

Physiotherapists Registration (Amendment) Act 1959 No. 19—N.S.W.

Amends the *Physiotherapists Registration Act* 1945 (as amended). An Act to prohibit, subject to certain exceptions, the practice of physiotherapy by unregistered persons. Assent: 14 October 1959, *Gazette* No. 121, p. 3222.

Suitors Fund (Amendment) Act 1959 No. 20 — N.S.W.

An Act to make further provision in respect of the liability for costs for certain litigation and amending the *Suitors Fund Act* 1951, the *Legal Assistance Act* 1943 and certain other Acts. Assent: 19 October 1959, *Gazette* No. 121, p. 3222.

Land and Valuation Court Rules 1921-1957 — N.S.W.

Rules 12B (4), 108, 109 and Form No. 36 amended — *Gazette*, 23 October 1959, p. 3217 — Operation: 1 January 1960.

Solicitors Costs under Conveyancing Act 1919-1954 — N.S.W.

New Scale of Charges, see Supplement to this Journal issued in December.

CASE NOTE

Will

Probate—lost will—presumption of revocation—rebuttal—nature and sufficiency of evidence.—On appeal against the dismissal of an application for the grant of probate of a missing will, consideration was given to the general principles on which the court acts when asked to grant probate of a lost will, i.e., that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself, and that presumption must have effect unless there is sufficient evidence to repel it. It was held that the nature of the provisions of the will itself were material to the probabilities of destruction having taken place *animo revocandi*. In the circumstances the unlikelihood of the testator having changed his attitude to the beneficiary, a reference by the testator shortly before his death to the continued existence of the will, the mental and physical condition of the testator at the time of such reference, were important factors of evidentiary value against the probabilities of revocation by destruction. The order dismissing the application for probate was set aside and the application for probate of the missing will was granted (*In the Will of W. J. Boyd, deceased; Ex parte Whelan* (1959), 76 W.N. (N.S.W.) 515) (STREET, C.J., OWEN and HARDIE, JJ.) (Supreme Court).

THE ARGUS LAW REPORTS

The New Year saw a considerable change in the life of a well-known series of reports, The Argus Law Reports. These reports, which are to be found on the shelves of most Victorian practitioners, have now reached out for a wider audience. The publishers have devoted the Reports to High Court decisions, seeking to provide a prompt report of all decisions with all-Australian interest. The High Court cases will apparently shortly be joined by some decisions of the Bankruptcy Court and of the various State Courts where these deal with the new Federal Divorce Legislation.

The result is a Report which should have considerable appeal for legal practitioners, both barristers and solicitors, seeking Privy Council, High Court, and pertinent Interstate decisions, but reluctant to indulge in the extravagance of six or more different Reports. The subscription carries the right to a bound volume, a welcome relief from binding worries. Barristers and solicitors alike, will no doubt appreciate the stress on brevity in headnotes and the change to the use of bold type in indicating subject matter headings.

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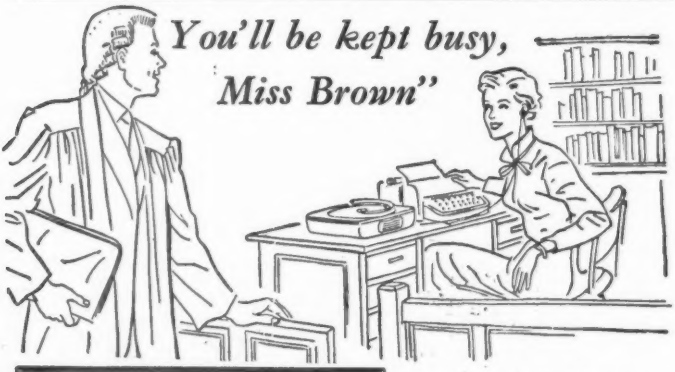

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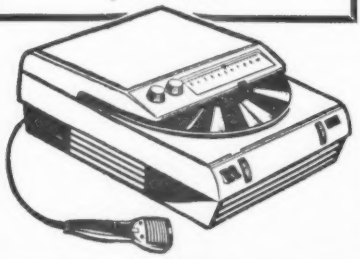

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